WILLS—THE RULE IN SHELLEY'S CASE.—The Supreme Court of the United States recently held [1] that, where the testator, after directing that the proceeds of the sale of the residue of his real estate should be divided among his heirs share and share alike, directed that the share of one son should be paid to trustees and by them invested, "the income therefrom to be paid the son, the principal to be paid to his heirs after his death," the rule in Shelley's Case [2] did not apply.

The rule in Shelley's Case provides that "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs in fee or in tail, always in such cases 'the heirs' are words describing the extent or quality of the estate conveyed, and not designating the persons who are to take it." [3] In order that the rule may apply, the ancestor must take an estate of freehold by the same assurance which contains the limitation to his heirs; the word "heirs" must be used in its full legal sense; the interest limited to the ancestor and that to his heirs must be of the same quality; and the estate of the heirs must be by way of remainder. If the rule is applicable it is not one to be used by the courts simply as an aid in ascertaining the intention of the testator, but is a rule of property and prevails in spite of any contrary intention.[4]

The great confusion in the cases in which the rule in Shelley's Case has been discussed, is due to the difficulty in determining whether the situation is one to which the rule should be applied, and not to any misconception of what the rule or its effect is. There are always several preliminary questions to be decided before applying the rule. In the principal case [5] the problem was whether the word "heirs" was used in its technical sense as designating those who were to take from generation to generation, or descriptive of a class taking from the testator directly. If the testator uses the word "heirs" without any qualifying words, it will be presumed that he intended to use it in its strict technical meaning as a word of limitation, and the rule will apply.[6] The burden is on those who contend that the word "heirs" is used as a word of purchase.[7] There is no definite rule of law to govern the interpretation of the

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[1] Vogt v. Graff, 32 Sup. Ct. Rep. 134 (1911).

[2] Coke, *94 (1581).

[3] Note 29 L. R. A. (N. S.) 963, at page 971.

[4] Shapley v. Diehl, 203 Pa. 566 (1902). There a few cases in which this rule is treated as one of construction. Smith v. Hastings, 29 Vt. 240 (1857); Zavitz v. Preston, 96 Iowa, 52 (1895).

[5] Vogt v. Graff, 32 Sup. Ct. Rep. 134 (1911).

[6] Hileman v. Bauslaugh, 13 Pa. 344 (1850); Duffy v. Jarvis, 84 Fed. 731 (1898).

[7] Appeal of Guthrie, 37 Pa. 9 (1860); Jesson v. Wright, 2 Bligh 57 (Eng. 1820); Daniel v. Whartenby, 17 Wall. 639 (1873).

intention of the testator. Each case must necessarily stand on its own facts and the language of the whole will must be taken into consideration. There is no uniformity of opinion as to the effect of the use of certain qualifying words or clauses. Some courts have held that the words "at his death" show an intention to limit the time of distribution to a definite time rather than to permit the property to descend in the regular course from generation to generation.[8] In other cases they have been considered as of no significance.[9] If from the whole will it appears that the word "heirs" was used to designate a particular individual or a particular class of objects, the rule does not apply.[10]

The decision of the court in Vogt v. Graff [11] was based on the finding that the testator had manifested an intention, by the express wording of his will, to use the word "heirs" as descriptive of a particular class of individuals who were to take as purchasers from him. Even if the court had decided that the word "heirs" was used in its technical sense, the rule in Shelley's Case could not have been applied. The remainder and the prior estate of freehold can coalesce in the ancestor and give him a fee, only when the two estates are of the same quality: either both must be legal or both equitable.[12] If the estate of the ancestor is equitable and that of the heir legal, the rule cannot be applied.[13] *R. B. W.*

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[8] Foxwell v. Craddock, 1 Patton & H. 250 (Va. 1855); Smith v. Smith, 8 Ont. Rep. 677 (1885).

[9] Pierce v. Pierce, 14 R. I. 514 (1885).

[10] Belcher's Estate, 211 Pa. 615 (1905); Kemp v. Reinhard, 228 Pa. 143 (1910); Hall v. Gradwohl, 113 Md. 293 (1910).

[11] 32 Sup. Ct. Rep. 134 (1911).

[12] Van Grutten v. Foxwell, 77 L. T., N. S. 170 (1892).

[13] Rife v. Geyer, 59 Pa. 393 (1868); Green v. Green, 23 Wall. 486 (1874); Eshback's Est., 197 Pa. 153 (1900).